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No. 80-1986

In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD E. DISTLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish petitioner's guilt.

2. Whether testimony regarding the reliability of certain oil analysis techniques was properly admitted.

3. Whether the grand jury testimony of trial witnesses was properly introduced and treated as substantive evidence pursuant to Fed. R. Evid. 801 (d) (1).

4. Whether testimony by an FBI agent regarding prior statements by two witnesses was properly admitted.

5. Whether the criminal penalties of the Federal Water Pollution Control Act for an unlawful discharge of pollutants and the disruption of a sewage treatment plant are void for vagueness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 23-42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1981, and a petition for rehearing was denied on March 31, 1981 (Pet. App. 43). The petition for a writ of certiorari was filed on May 26, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATION INVOLVED

The relevant portions of the Federal Water Pollution Control Act, 33 U.S.C. 1311(a), 1317(c) and (d), and (& Supp. III) 1319, are set forth in the

petition (Pet. App. 47, 62-69). The applicable regulation, 40 C.F.R. 128.131 (1977), is set out in the Appendix, *infra*, 1a.

STATEMENT

From November 9 through December 26, 1978, petitioner and two others, Charles William Horn, Jr., and Joseph Alfred Hess, Jr., were tried on a five count indictment charging conspiracy and substantive offenses relative to toxic chemical discharges into the Louisville, Kentucky, sewer system and into the Ohio River. Counts Four and Five charged petitioner and his co-defendants with discharging pollutants into the Ohio River via the Louisville and Jefferson County Metropolitan Sewer District (MSD) sewer system and interference with the operation of MSD's Morris Forman Wastewater Treatment Plant, in viotion of 33 U.S.C. 1311, 1317, and 1319, and 40 C.F.R. 128.131 (1977).[1] The pollutants involved included hexachlorocyclopentadiene ("hexa"), octachlorocyclopentene ("octa"), and hexachlorobenzene ("HCB"). The defendants were officers or employees of Kentucky Liquid Recycling, Inc. Hess and Horn were acquitted on all counts; petitioner was convicted on Counts Four and Five, and acquitted on the remaining counts.

On September 14, 1979, noting that no defendant who had passed before the bench had "exhibited a more callous and flagrant disregard for the safety and lives of vast numbers of citizens" (Sentencing Tr. 8), the trial judge imposed consecutive sentences

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[1] Counts One and Two charged conspiracy directly related to Counts Four and Five, respectively. Count Three charged petitioner and others unknown to the grand jury with causing the discharge of pollutants into waters of the United States, in violation of 33 U.S.C. 1311 and 1319.

of one year's imprisonment on each count and fined petitioner $25,000 on each count.

The evidence at trial showed that at the Morris Forman Wastewater Treatment Plant in Louisville, employees in the portion of the plant where sewage initially enters the plant began experiencing respiratory, dermatological, and other difficulties in mid-March of 1977. T.T. II 52, 107-108, 132-133. Their problems appeared to be related to the presence in the plant of a thick, oily, brownish residue that smelled like a concentrated weed killer. T.T. II 62. When efforts were made to clean away that material using steam, it gave off vapors that caused workers to leave the area. T.T. II 63, 65-66, 70, 113, 116.

Analysis of the residue disclosed that it was the waste, called "PCL bottoms," from the production of hexa, a chlorinated hydrocarbon used in the production of chemical compounds such as pesticides and flame retardant resins.[2] T.T. II 159-160; VII 65-73, 141, 170. The only domestic manufacturer of hexa was Velsicol Chemical Corporation (T.T. VII 121), which had contracted with Chem-Dyne Corporation to dispose of its PCL bottoms (T.T. VII 183; VII 13-14). The material was mixed with a number 4 grade fuel oil for transportation in tractor trailers of a distinctive appearance. T.T. VII 73, 77-78; VIII 7, 22; IX 226-231. That oil was produced by mixing a specific quantity of a lighter grade oil with an estimated amount of heavier oil, so that each tanker load contained a unique blend of oils. T.T. VII 172-174.

Hexa has a very distinctive odor, and, when vaporized, causes eye and skin irritations comparable to

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[2] PCL bottoms contain greater quantities of octa and HCB than the commercial grade hexa. T.T. VII 66-73, 170.

those caused by tear gas. T.T. VII 97. It is, moreover, highly toxic, and, even in small concentrations, may attack the liver and central nervous system. Accordingly, as soon as the residue was identified, MSD ordered all employees out of the treatment plant and began by-passing virtually all sewage flow directly into the Ohio River. T.T. II 184-185, 180, 16; I 96, 105-112. As a result of the abandonment and by-pass, 90 to 105 million gallons of untreated sewage and pollutants were discharged daily into the Ohio River between March 29 and June 18, 1977. T.T. I 113.

Efforts to identify the source of the toxic contaminants in order to shut off their discharge into the sewer system proceeded along two lines (T.T. III 136): attempts were made both to discover the source of entry of the material into the sewer system, and to discover the source of entry of the material into the Louisville area. By April 4, 1977, these two parallel tracing procedures had led environmental investigators to two locations: (1) a distillery demolition site in Louisville that appeared to be the source of entry of the materials into the sewer system, and (2) the facilities of Kentucky Liquid Recycling, Inc., in New Albany, Indiana (directly across the Ohio River from Louisville).

The tracking of the contaminants through the sewer system involved, first, tracing the hexa odor to an intersection near the demolition site (T.T. II 146), and, second, taking samples from the major trunk lines,[3] analyzing those samples for the contaminants, eliminating those lines not showing con-

[3] Since the PCL bottoms are heavier than water and do not mix with it (T.T. VII 97), they tended to move along the bottoms of the sewers in gooey masses, T.T. XIV 73-75, 140-141, 195-196; XII 15.

tamination, and then working back up the contaminated lines to the point of pollutant introduction. T.T. XII 15; XIV 73-75, 140-141, 195-196. Gradually, the samplers worked their way back to the same area where odor searches had led. T.T. XV 150-152.

The parallel effort, to determine how the contaminants had reached the Louisville area, soon led to Velsicol and Chem-Dyne Corporation. Chem-Dyne's records showed that it had been delivering PCL bottoms to Kentucky Liquid Recycling (KLR). T.T. III 139-140. Therefore, on April 4, personnel from EPA and other administrative agencies visited KLR's facility at New Albany. T.T. III 144; XV 174; XII 60, 176. They were advised that PCL bottoms were being stored in somewhat random fashion in the various tanks on the property (T.T. III 182-183; XXIV 153, 155, 158) pending the completion of an incinerator unit.[4] T.T. XXIV 121, 141-143, 200-201, 236.

The parallel investigations finally converged on a site in western Louisville at which an old distillery was being demolished. The site was next to the street intersection to which the sewer traces had tracked the contaminants, and the demolition work was being done by Frank Hornung, an old friend and business associate of petitioner. Samples from the sewer manholes on the site had the highest con-

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[4] Under the agreement KLR had entered into with Chem-Dyne, KLR was to hold the Velsicol PCL bottoms until such time as the incinerator was in operation and was to dispose of all the chemical wastes it received in accordance with applicable local, state, and federal laws. T.T. VIII 200-201; T.E. US 36. Petitioner had no permit for the operation of any incinerator. T.T. XXVI 165-166, 176-178.

taminant concentration of any sewer samples taken.[5] T.E. US 222A.

At the demolition site FBI agents interviewed Hornung and various laborers employed by him. They learned that petitioner had been seen pulling a distinctive PCL bottoms type tanker with a tractor belonging to KLR (T.T. X 138, 134-136) and that such tankers had been rinsed out on the site while a hose from the underside of a tanker led into the sewer. T.T. X 183-185, 191-192; XI 27-28, 66-73, 77, 92, 99-125. This information, which was also given to the grand jury, was corroborated by the analyses of samples taken at petitioner's New Albany plant, at the demolition site, and at the abandoned treatment plant.

The focal point of the scientific evidence introduced at trial was the oil with which the PCL bottoms were mixed for transportation, which was readily comparable from sample to sample by sophisticated analytical techniques.[6] The presence of the octa mixed with the oil, though, helped to reinforce and confirm the "matches" of samples taken from

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[5] The sewer on the site was a small branch line from the contaminated trunk line, which did not appear on MSD's maps; it had not been investigated earlier because its existence was unknown.

[6] Three separate techniques were employed by EPA chemists: (1) oil matching or oil fingerprinting, (2) compound identification, and (3) mass spectrometry. Each is an independent and distinct technique. The only link among the three is the gas chromatograph, which initially reduces sample materials to discrete molecular components. Thereafter, oil matching, compound identification, and mass spectrometry develop along independent analytical lines. T.T. XVIII 113-114.

the treatment plant, the demolition site, and Tank 6 at the KLR facility.

The conclusion reached by EPA chemists as a result of their analyses of samples from the three locations was that the contaminants from the treatment plant and demolition site had come from the same source as the material in KLR Tank No. 6. T.T. XX(B) 41-51; XIX 55. That same conclusion emerged from each of the different types of analysis performed on the samples. T.T. XXI 80-81, 83-84. Moreover, the same conclusion was reached whether the focal point of analysis was the oil mixed with the chlorinated hydrocarbons or those chemicals themselves. Those conclusions of identical source were based on the uniqueness of each oil blend in each tanker, the uniqueness of each tanker mixture of oil and PCL bottoms, and the uniqueness of the mixture in each KLR storage tank.

ARGUMENT

1. The above summary of the evidence presented in this two-month trial demonstrates that there is no merit to petitioner's claim that there was insufficient evidence to establish his guilt beyond a reasonable doubt (Pet. 5). In sum, the evidence showed that the material that disrupted the operation of the sewage treatment facility came from the same source as the material in KLR's Tank No. 6 (T.T. XX(B) 41-51; XIX 55); that petitioner had been seen driving to the demolition site the unique type of tankers which hauled the PCL bottoms, where they had been seen apparently being drained into the sewer (T.T. IX 112-118, 135, 138, 182-183, 155-156; X 134-136, 149-152, 183-185, 191-192; XI 8-10, 22, 27-28, 66-73, 77-92, 99-125); and that petitioner was receiving PCL bottoms at a rapid rate, but had only

a limited storage capacity (T.T. VIII 214-215, 163-164, 31-32; IX 222-223) and no capacity, or immediate prospects of a capacity, to incinerate them (T.T. XXV 153, 31, 42; XXIV 70, 121, 141-143, 200-201, 206, 236; XXVI 165-166, 176-178). Far from being inadequate to support his conviction, the evidence of petitioner's guilt was overwhelming.

2. At trial and on appeal, petitioner challenged the reliability of the various chemical analyses that linked him to the contamination of Louisville's sewer system and their acceptance within the scientific community. The court of appeals dealt with petitioner's arguments on the scientific evidence very thoroughly (Pet. App. 34-41), and petitioner no longer is pursuing that issue. In this Court petitioner argues only that he was prejudiced by the evidence of the statistical reliability of the chemical analyses used (Pet. 7-10). Petitioner has thus abandoned his argument that the chemical analytical evidence should not have been admitted because its reliability was not established, and now contends instead that the evidence establishing that reliability should not have been admitted. That contention is also without merit.

Petitioner's suggestion that the statistical reliability evidence involved a quantification of the likelihood of his guilt is plainly wrong. That evidence simply provided the foundation of reliability for introduction of evidence that linked petitioner with the sewer and treatment plant contamination. Neither is there any conflict among the circuits about the admissibility of such evidence. The statistical evidence demonstrating the reliability of oil identification techniques was unlike the "speculative and confusing" testimony and closing argument in *United States* v. *Massey*, 594 F.2d 676, 680-681 (8th Cir. 1979), upon which

petitioner relies. In *Massey*, the witness stated that "in examining about probably in excess of 2,000 cases, * * * I have seen only on a couple of occasions I have seen hair from two different individuals I could not distinguish" (594 F. 2d at 679). The court and the prosecutor erroneously suggested to the jury that this testimony demonstrated that there was only one chance in a thousand for error in hair comparisons. Here, in contrast, the reliability of the tests was established by a carefully planned set of controlled studies by one of the developers of the technique, aimed specifically at determining the soundness of oil fingerprinting as an analytical technique. The background of that work was thoroughly considered by the trial judge in chambers before the jury was allowed to hear the evidence.[7]

3. The United States introduced the grand jury testimony of Hornung (petitioner's friend and business associate) and several of his employees, who could no longer recall at trial such matters as whether they had seen petitioner at the demolition site, or any details about his activities at the site. Each of the witnesses testified at trial that he had testified truthfully before the grand jury; his grand jury testimony was then read to him, and he was given the opportunity to explain it. (See, *e.g.*, T.T. XXII 29-46; XI 83, 108-109.) The jury was in-

[7] The conclusion of the government's expert drawn from his controlled studies was that each of the several methodologies applied to the Louisville samples was at least 90% reliable. T.T. XIX 98; XVII 39. In accordance with a basic rule of statistics, when several techniques are applied to the same sample(s), the statistical reliability of the multiple analyses is cumulative. Here three independent techniques, each established as being at least 90% reliable, yielded a cumulative reliability of the combined methodologies on the order of 99.9%. T.T. XIX 103, 112.

structed to weigh any inconsistencies between the two versions, and to decide the significance to attach to each. T.T. XXVII 152.

Petitioner contends (Pet. 10-14) that this use of the grand jury testimony violated his right to an open trial. This argument is without merit. The witnesses were available in open court at his trial, and had ample opportunity to explain their earlier statements. Indeed, as the Advisory Committee Notes on Fed. R. Evid. 801(d) point out, "[i]f the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem." Similarly, there is no "secret trial" problem. Cf. *California* v *Green*, 399 U.S. 149, 164 (1970).

4. Petitioner contends that prior inconsistent statements of two witnesses were not disclosed in time to permit their use in cross examination (Pet. 14-17). The two witnesses were laborers at the demolition site, and the undisclosed statements were statements made to the FBI that were substantially identical to their grand jury testimony and the FBI interview reports, both of which were available to defense counsel before the witnesses testified. T.T. XXI 209-216.[8] Moreover, as the trial court noted (T.T. XXII 9), possession of the witnesses' statements at the time of their testimony would not have aided petitioner because their courtroom testimony was favorable to the defendants. Nothing in the prior statements was exculpatory, and impeachment of the trial testimony was not in defendants' interest. In sum, any error in the delay in disclosing these statements was clearly harmless. See *United States* v.

[8] The delay in the disclosure of the statements was due to government counsel's ignorance of their existence at the time the witnesses testified. T.T. XXI 222-224.

Day, 476 F.2d 562, 569 (6th Cir. 1973); *United States* v. *Thompson*, 422 F.2d 1104, 1108-1109 (6th Cir. 1970); *United States* v. *Williams*, 319 F.2d 479, 481 (6th Cir. 1963).

5. Finally, petitioner argues that the Federal Water Pollution Control Act (FWCPA) does not plainly impose a criminal penalty for discharges of pollutants into waters of the United States or for interfering with the operation of a publicly owned treatment works. That argument is without merit.

Under 33 U.S.C. 1311(a) it is unlawful for any person to discharge a pollutant except in compliance with certain other specified provisions of the FWPCA, among them the permit requirement of 33 U.S.C. (& Supp. III) 1342 and the requirements of 33 U.S.C. (& Supp. III) 1317. Under 33 U.S.C. 1317(d) it is unlawful to violate any effective pretreatment standard (which includes the prohibition against discharging substances which will interfere with the operation of publicly owned treatment works set forth in former 40 C.F.R. 128.131 (1977)).[9] The consequences for violating either of those statutory proscriptions are clearly set out in 33 U.S.C. (Supp. III) 1319(c)(1):[10]

> Any person who willfully or negligently violates section 1311, * * * 1317 * * * or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State * * * shall be punished by a fine of not

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[9] Essentially the same standard is now contained in 40 C.F.R. 403.5.

[10] The FWPCA was amended on December 27, 1977 by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566, but 33 U.S.C. (Supp. III) 1319(c)(1) still reads as it did at the time of the events for which petitioner stands convicted.

> less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both.

Petitioner also argues that an administrative order under 33 U.S.C. (Supp. III) 1319(a)(3) is a statutory prerequisite to the institution of a criminal prosecution under 33 U.S.C. (Supp. III) 1319(c)(1). But Subsection (c)(1) contains absolutely no suggestion that there is any administrative prerequisite to a criminal action; nor is there any reference to the criminal provisions of the FWPCA in Subsection (a), which addresses administrative orders. *United States* v. *Frezzo Bros.*, 602 F.2d 1123, 1136 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980), expressly rejects the claim that Congress intended to permit the criminal prosecution of willful polluters only after prior notification, followed by continued polluting in the face of such notice. See also *United States* v. *Phelps Dodge Corp.*, 391 F. Supp. 1181 (D. Ariz. 1975); cf. *United States* v. *Hamel*, 551 F.2d 107, 109 (6th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

40 C.F.R. 128.131 (as in effect in 1977; subsequently amended and repromulgated as 40 C.F.R. 403.5; 43 Fed. Reg. 27747 (1978))

§ 128.131 Prohibited wastes.

No waste introduced into a publicly owned treatment works shall interfere with the operation or performance of the works. Specifically, the following wastes shall not be introduced into the publicly owned treatment works:

(a) Wastes which create a fire or explosion hazard in the publicly owned treatment works.

(b) Wastes which will cause corrosive structural damage to treatment works, but in no case wastes with a pH lower than 5.0, unless the works is designed to accommodate such wastes.

(c) Solid or viscous wastes in amounts which would cause obstruction to the flow in sewers, or other interference with the proper operation of the publicly owned treatment works.

(d) Wastes at a flow rate and/or pollutant discharge rate which is excessive over relatively short time periods so that there is a treatment process upset and subsequent loss of treatment efficiency.

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